

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
Indianapolis Division**

McMILLAN McGEE CORP.,

Plaintiff and Counterclaim Defendant,

v.

THIRD SITE TRUST FUND,

Defendant and Counterclaim Plaintiff.

No. 1:21-cv-01988-TWP-MJD

**DEFENDANT THIRD SITE TRUST FUND'S ANSWER AND DEFENSES TO
COMPLAINT, COUNTERCLAIMS, AND REQUEST FOR JURY TRIAL**

Defendant and Counterclaim Plaintiff Third Site Trust Fund (“the Trust”), for its Answer to Plaintiff and Counterclaim Defendant McMillan McGee Corp.’s (“McMillan”) Complaint for Damages and Immediate Possession of Personal Property, and Request for Jury Trial (“Complaint”), and for its Defenses, Counterclaims and Request for Jury Trial against McMillan, states as follows:

ANSWER

I. PARTIES, VENUE, & JURISDICTION

1. The Plaintiff, McMillan McGee Corp. (“McMillan”) is a Canadian corporation domiciled in Calgary, Alberta.

ANSWER: The Trust admits that McMillan is a Canadian corporation but lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 1 of the Complaint and therefore denies the same.

2. The Defendant, the Third Site Trust Fund (the “Trust”) is a trust established pursuant to the laws of the State of New York and pursuant to Administrative Order by Consent, docket V-W-02C-698.

ANSWER: The Trust admits that it was established under the laws of the State of New York. The Trust admits that it was established pursuant to the Administrative Order by Consent, Docket V-W-02C-698 and that the Trust was established pursuant to a Trust Agreement.

3. The amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

ANSWER: The Trust admits that the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs; however, the Trust denies that McMillan is entitled to any damages.

4. Jurisdiction in this Court is proper pursuant to 28 U.S.C. 1332(a)(2).

ANSWER: To the extent paragraph 4 of the Complaint alleges legal conclusions, no response is required. To the extent a response is required, the Trust admits that jurisdiction in this Court is proper pursuant to 28 U.S.C. § 1332(a)(2).

5. Diversity jurisdiction exists because (a) there is complete diversity of citizenship between Mc2 and the Trust; and (b) the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

ANSWER: To the extent paragraph 5 of the Complaint alleges legal conclusions, no response is required. To the extent a response is required, the Trust admits that diversity jurisdiction exists.

II. BACKGROUND

6. Mc2 is an environmental remediation company domiciled in Calgary, Alberta, Canada, and conducting business worldwide.

ANSWER: The Trust lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6 of the Complaint and therefore denies the same.

7. This action relates to remediation work performed by Mc2 at the Third Site, a Superfund Site near Zionsville, Indiana (the “Site”).

ANSWER: To the extent paragraph 7 of the Complaint asserts legal conclusions, no response is required. To the extent a response is required, the Trust admits that it retained McMillan to design, install, operate, and maintain an Electrical Resistance Heating (“ERH”) remediation system at the Zionsville Third Site Superfund Site to “achieve 90% reduction in the concentration of total volatile organic compounds (“total VOCS”) in groundwater in the Third Site DNAPL Area” pursuant to an October 3, 2016 Contract between the Trust and McMillan (the “Contract”, at §1.1.1). The Contract speaks for itself. The Trust denies that McMillan performed the work required under the Contract and therefore denies the remaining allegations in paragraph 7 of the Complaint.

8. On May 11, 2001 the United States Environmental Protection Agency (“EPA”) issued an Enforcement Action Memorandum (“EAM”) detailing that removal actions were necessary to address the threats posed by the presence of [total] Volatile Organic Compounds (“VOCs”) and dense non-aqueous phase liquids (“DNAPLs”) at the Site. The minimum cleanup requirements pursuant to the EAM included a 90% reduction in VOCs within the DNAPL area.

ANSWER: To the extent paragraph 8 of the Complaint asserts legal conclusions, no response is required. The Trust further answers that the May 11, 2001 EAM speaks for itself. To the extent a response is required, the Trust admits that the EPA issued an EAM on May 11, 2001, and that the EAM stated that due to EPA’s “determination of an imminent and substantial threat to public health, welfare and the environment” that a 90% reduction in total VOCS and dense

non-aqueous phase liquids (“DNAPLs”) in groundwater within the DNAPL area was required.

The Trust denies all other allegations in paragraph 8 of the Complaint.

9. Under an Administrative Order on Consent signed on or about November 21, 2002 (the “Consent Order”) by a number of Potentially Responsible Parties (“PRPs”), the PRPs introduced a plan to implement the removal actions identified in the EAM. Part of this treatment plan included attempting to contain the DNAPL Area by enclosing the area laterally with a sheet pile wall.

ANSWER: To the extent paragraph 9 of the Complaint asserts legal conclusions, no response is required. The Trust further answers that the Consent Order speaks for itself. To the extent a response is required, the Trust admits that an Administrative Order on Consent was signed on or about November 21, 2002 by William Munro, then-Director of the Superfund Division of EPA, Region 5, and that it included a plan to install a sheet-pile wall to contain the DNAPL Area. The Trust denies all other allegations in paragraph 9 of the Complaint.

10. On December 12, 2016, the EPA issued an Amended Enforcement Action Memorandum (the “Amended EAM”) approving a change in scope for the remediation of the Site to add Electrical Resistance Heating (“ERH”) to treat the affected areas. ERH is an *in-situ* treatment process that applies electrical current to the contaminated zone to generate heat near or above the boiling points of the targeted chemicals. The chemicals are vaporized and then a vapor extraction system removes them from the Site.

ANSWER: To the extent paragraph 10 of the Complaint asserts legal conclusions, no response is required. The Trust further answers that the Amended EAM speaks for itself. To the extent a response is required, the Trust admits that the EPA issued an Amended Enforcement Action Memorandum (the “Amended EAM”) dated December 12, 2016. To the extent McMillan is asserting in paragraph 10 of the Complaint that its obligations under the Contract are based solely on or limited to the Amended EAM, the Trust denies this allegation.

III. THE CONTRACT

11. Mc2 was contracted to provide ERH Treatment at the Site pursuant to a Contract dated October 3, 2016 between Mc2 and the Trust (the “Contract”). A copy of the Contract is attached hereto as **Exhibit A**.

ANSWER: To the extent paragraph 11 of the Complaint alleges legal conclusions, no response is required. The Trust further answers that the Contract speak for itself. To the extent a response is required, the Trust admits that it retained McMillan to design, install, operate, and maintain an ERH system at the Site pursuant to the Contract between the Trust and McMillan. The Trust admits that McMillan has attached as **Exhibit A** a document that purports to be the Contract entered into between the Trust and McMillan on or about October 3, 2016.

12. Specifically, pursuant to §1.1.1 of the Contract, McMillan was contracted to design, install, operate and maintain an ERH system to reduce the concentration of VOCs by greater than 90% in the sheet pile enclosed defined DNAPL Area to a depth of 40 feet and in the defined Additional Thermal Treatment Zone (the “ATT zone”), (the “Contract Goal” or the “Remediation Goal”)

ANSWER: To the extent paragraph 12 of the Complaint alleges legal conclusions, no response is required. The Contract speaks for itself. To the extent a response is required, the Trust admits that the Contract, by its express terms, required McMillan to design, install, operate, and maintain an ERH system to “to achieve a reduction in the concentration of total volatile organic compounds (“VOCs”) in groundwater in the Third Site DNAPL area to a depth of forty (40) feet and in the small ATT zone outside the sheet pile wall, by greater than 90% at both locations[.]” Contract at §1.1.1. The Trust denies that McMillan’s performance obligations are controlled solely by or limited to §1.1.1 of the Contract. The Trust further avers that the Contract includes multiple representations by McMillan that it had thoroughly investigated relevant site conditions and that McMillan accepted the conditions of the Site “as is” and assumed all liability, risk and responsibility with respect thereto and would be responsible for

achieving the mandated cleanup objectives even if site conditions differed from what McMillan expected. Specifically, § 4.1 of the Contract states:

In order to induce the Trust to enter into this Contract, Contractor [which is defined in the Contract as McMillan] makes the following representations, upon which the Trust has relied in entering into this Contract:

4.1.1 Contractor has obtained and carefully studied (where applicable), and has fully and carefully inspected and/or is familiar with, the Consent Order including the EAM, the Work, Site, locality, and all local conditions and Laws and Regulations that in any manner may affect cost, progress, performance, furnishing or completion of the Work. In this connection, Contractor acknowledges that Contractor has consulted with and obtained advice of legal counsel regarding environmental Laws and Regulations and the Consent Order.

4.1.2 Contractor has obtained and carefully studied (or assumed responsibility for obtaining and carefully studying) all such examinations, investigations, explorations, tests, reports and studies which pertain to the surface or subsurface at or contiguous to the Site, including without limitation availability of utilities, storage and parking, or which otherwise disclose conditions which may affect the cost, progress, performance, furnishing or completion of the Work as Contractor considers necessary for the performance or furnishing of the Work at the Contract Price, within the Contract Time and in accordance with the other terms and conditions of the Contract Documents, subject to the provisions of Sections 7.2, 7.2A and 7.3 of the Contract, Contractor agrees to accept the conditions of the Site "as is" and Contractor assumes all liability, risk and responsibility with respect thereto.

4.1.3 Contractor has fully reviewed the Contract Documents before bidding. Prior to submission of its bid, Contractor gave the Trust written notice of any and all conflicts, errors or discrepancies in the Contract Documents and the written resolution thereof is acceptable to the Contractor. No changes in the Contract Documents will be required by Contractor or granted by the Trust in order to perform and furnish the Work at the Contract Price, within the Contract Time and in accordance with the other terms and conditions of the Contract Documents. In addition to the foregoing, both parties shall have a continuing obligation to advise the each other of any conflicts, errors or discrepancies in the Contract Documents which either of them shall discover after the date of this Contract, but no such subsequently discovered conflicts, errors or discrepancies shall affect Contractor's obligation to perform and furnish the Work at the Contract Price in accordance with the other terms and conditions of the Contract Documents or any of Contractor's other obligations under the Contract Documents.

4.1.4 Contractor has correlated to Contractor's satisfaction the results of all its observations, examinations, investigations, explorations, tests, and reports.

The Trust denies the remaining allegations of paragraph 12 of the Complaint.

13. The relevant sections of the Contract attached hereto as **Exhibit A** indicate as follows:

- 1.1 *Scope – Contractor shall perform and complete on time the Work provided for in this Contract at Third Site, a Superfund Site located in Boone County, Indiana (the “Site”). The Site is subject to an Environ 2004 Design approved by EPA so as to achieve certification by EPA that the removal Action (“RA”) cleanup levels as defined in the Consent Order and the Enforcement Action Memorandum (“EAM”) referenced herein, have been fully achieved (not including the cleanup levels to be achieved through long-term monitored natural attenuation). The Environ 2004 Design presently includes the implementation of chemical oxidation in a sheet pile enclosed DNAPL area (“the DNAPL area”). The Trustee[s] have requested that EPA approve the substitution of ERH to achieve the required cleanup levels in the DNAPL area and also to allow its use in the small Additional Thermal Treatment Zone (the “ATT zone”) adjacent to and just outside [the] of the DNAPL area. Assuming that such final approval is received, the Work includes the following:*
 - 1.1.1 *Preparation of a Remedial Action Work Plan (“Work Plan”) for submission to EPA of the design, installation, operation and maintenance of an ERH system at Third Site to achieve a reduction in the concentration of total volatile organic compounds (“VOCs”) in groundwater in the Third Site DNAPL area to a depth of forty (40) feet and in the small ATT zone outside the sheet pile wall, by greater than 90% at both locations;*
 - 1.1.5 *Following final approval of the ERH Design Package by EPA (the “Final ERH Design Package”), design, install, and operate and maintain (“O&M”) an ERH system in accordance with the Final ERH Design Package to achieve a reduction in the concentration of total VOCs in groundwater in the Third Site DNAPL area to a depth of forty (40) feet and in the small ATT zone outside the sheet pile wall, by greater than 90% at both locations;*
- 4.2 *...Contractor shall be solely responsible for the means, methods, techniques, sequences, procedures of construction and safety at the Site that implement the requirements of the Contract Documents, and the same shall be performed in accordance with all applicable Laws and Regulations....*
- 7.1 *Explorations And Reports — Reference is made to the background information distributed with the Invitation to Prequalify for this Contract that may have been utilized in the preparation of the Contract Documents. The background information is for general information purposes only and the Trust does not guarantee the background information, except that the Contractor may rely (a) upon the accuracy but not the completeness of the technical data and dimensions that are contained in drawings prepared by Environ or Ramboll Environ (except that depth of treatment shall be to forty*

(40) feet), (b) the information regarding Grain Size Distribution and Additional Soil Data provided to the Contractor in an e-mail from the Trust dated March 11, 2016, and (c) the Technical Memorandum provided by Ramboll Environ as to Soil Resistivity Testing and other matters (except as to any assumed depth of treatment) dated April 5, 2016. Except as indicated in the immediately preceding sentence and in Section 7.2 or 7.3, Contractor shall have full responsibility with respect to the physical conditions at or relating to the Site including surface, subsurface and other existing conditions.

7.2 Differing Conditions Resulting from Inaccurate Data — If Contractor believes that (a) there is an error in the items on which it is entitled to rely under Section 7.1, or (b) there is a "fundamental difference" as set forth in Section 7.2A, Contractor shall, within five (5) business days after becoming aware of (a) or (b) and before performing any further Work in connection therewith, notify the Trust and the Trust's Engineer in writing about the error or fundamental difference of the type referred to in (a) or (b) and the consequences of the error or fundamental difference. The Contractor shall follow the Trust's directives and shall be entitled, if appropriate, to an equitable adjustment in the Contract Price. There shall be no adjustment in the Contract Time for such differing site conditions except that the Contract Time shall be increased to the extent a time extension is received under the Consent Order. If no such time extension is granted, the equitable adjustment shall compensate the Contractor for reasonable acceleration costs necessary to overcome the delay caused by such error or errors.

7.2 A Fundamental Difference - The term "fundamental difference" for purposes of this Contract shall mean only a difference that causes EPA, after it has approved the use of ERH for the DNAPL area and the ATT zone and issued an Amendment to the EAM and/or issued an Explanation of Significant Differences ("ESD") with respect to that change, to issue a subsequent ESD or an Amendment to the EAM that alters the conditions or obligations applicable to the DNAPL area or the ATT zone. In the event of such subsequent ESD or subsequent Amendment to the EAM, the Trustees will either provide an equitable adjustment reasonably acceptable to Contractor or terminate the Contractor for convenience.

ANSWER: To the extent paragraph 13 of the Complaint alleges legal conclusions, no response is required. The Trust further answers that the Contract speaks for itself. To the extent a response is required, the Trust admits that McMillan purports to quote certain provisions from the Contract, but the Trust denies that the quoted Contract provisions are the only "relevant" or controlling provisions of the Contract. The Trust further answers that McMillan improperly fails

to advise the Court of the Contract provisions in among others: (a) in Sections 1.1.6 and 1.1.7; (b) Section 4.1, which is set forth in the Trust's Answer to paragraph 12 of this Answer; and (c) Section 7.3 . The Trust further denies that there was a "fundamental difference" as defined in Sections 7.2(a) and 7.3 of the Contract. The Trust denies all other allegations, explicit or implicit, in paragraph 13 of the Complaint.

14. In accordance with the terms of the Contract, Mc2's Technical and Cost Proposal dated August 15, 2016 was submitted to the Trust on August 15, 2016 (the "Design Proposal"). The Design Proposal, attached hereto as **Exhibit B**, noted:

3.2.1(8): Mc2 will not be held responsible for contamination of the treatment zone due to migration of pre-existing COCs from outside of the treatment zone.

ANSWER: To the extent paragraph 14 of the Complaint alleges legal conclusions, no response is required. The Trust further answers that the Contract speaks for itself. To the extent a response is required, the Trust admits that McMillan (here and sometimes hereafter designated by the Plaintiff as "Mc2") submitted to the Trust a Technical and Cost Proposal dated August 15, 2016. The Trust admits that McMillan attached as **Exhibit B** a document which it purports to be the Technical and Cost Proposal; however, the Trust presently lacks knowledge or information sufficient to form a belief as to the accuracy or completeness of this document. Furthermore, the Technical and Cost Proposal speaks for itself. The Trust denies that the Design Proposal is part of the Contract because, among other things, it is not listed as a Contract Document in Section 20.1 of the Contract and is excluded under Section 20.2 of the Contract. The Trust denies all other allegations, explicit or implicit, in paragraph 14 of the Complaint.

15. The Design Proposal outlined that Mc2's ERH system relied on inward pneumatic and hydraulic gradients. As a result, the contamination had to be properly delineated so as not to draw in outside contaminants.

ANSWER: The Trust denies the allegations of paragraph 15 of the Complaint and again denies that the Design Proposal is a Contract Document because, among other things, it is not listed in Section 20.1 of the Contract and is excluded under Section 20.2 of the Contract.

16. As well, Engineering Certification stated, “If conditions are discovered that differ from those described, the undersigned engineer should be notified to evaluate the effects of any additional information on the assessment and recommendations in this document.”

ANSWER: The Trust answers that the Design Proposal speaks for itself. The Trust denies that the Design Proposal is a Contract Document because, among other things, it is not listed in Section 20.1 of the Contract and is excluded under Section 20.2 of the Contract. The Trust further answers that there is no “Engineering Certificate” in the Design Proposal and, therefore, the Trust denies the allegations in Paragraph 16 of the Complaint.

IV. THE PROJECT

17. After approval by the EPA and the Trust of the Design Proposal, McMillan began operating its ERH system on September 24, 2018.

ANSWER: The Trust admits that McMillan initiated the ERH heating system on or about September 24, 2018, but the Trust denies the remaining allegations in the Paragraph 17. The Trust further avers that the original McMillan design proposal was not accepted by EPA or the Trust and that the operation of the ERH system was not contingent on approval of the Design Proposal. The Trust further answers that the Contract provided that the ERH system operations were not permitted until the EPA approved a Final Design Package and that the Final Design Report proposed by McMillan titled “Remedial Design Report Installation, Operation and Maintenance of ERH at Third Site Zionsville, Indiana”, dated April 23, 2018, and other associated reports, which reports and documents McMillan did not attach to its Complaint is a Contract Document under Section 20.1.7 of the Contract.

18. MC2's ERH system was operated as designed, with the desired effect of heating DNAPL Area to a depth of forty (40) feet below ground surface (BGS).

ANSWER: The Trust denies the allegations in paragraph 18 of the Complaint.

19. The extraction and treatment system operated at the design capacity throughout the project, and the average site temperature exceeded 88°C for a period of 83 consecutive days during operations (November 7th 2018 to Jan 30th 2019).

ANSWER: The Trust denies that the ERH system operated at the design capacity throughout the project and denies that the "average site temperature" is relevant. The Trust lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 19 of the Complaint, and therefore denies such allegations.

20. The system achieved a net extraction in excess of 2300 pounds of contaminants.

ANSWER: The Trust denies that the achievement of any specific net extraction of number of pounds of contaminants is a compliance standard under the Contract or that it is relevant to any of the contractual obligations that McMillan undertook under the terms of the Contract. The Trust further answers that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 20 of the Complaint and the Trust denies these allegations.

21. Testing conducted on January 30, 2019 revealed that VOCs were 210 µg/L; a full Order of magnitude lower than the Contract Goal.

ANSWER: The Trust admits that the Contract required confirmatory sampling, independent of McMillan, and specifically excluded compliance sampling by McMillan under Section 1.2 (iii) of the Contract, to confirm whether the Contract Goal was satisfied. The Trust lacks knowledge or information regarding testing that may have been done internally by

McMillan and is unable to form a belief as to the truth of the allegations in paragraph 21 of the Complaint, and therefore the Trust denies the allegations in paragraph 21 of the Complaint.

22. Testing conducted on March 29, 2019, however, unexpectedly revealed a “rebounding effect” or “recontamination” whereby the level of VOCs in two of the wells (P-1 and MW-27R) had increased to above the Contract Goal.

ANSWER: The Trust admits that the Contract required confirmatory testing independent of McMillan, and specifically excluded compliance sampling by McMillan under Section 1.2 (iii) of the Contract, and that the sampling conducted by Ramboll Environ (“Ramboll”) on or about March 2019 showed that the concentration of total VOCs at monitoring points P1, P2, and MW-27R exceeded the levels required by the Contract and therefore showed that McMillan had not achieved the 90% reduction of total VOCs in groundwater required by the Contract. The Trust denies all other allegations in paragraph 22 of the Complaint.

23. Well P-2 also showed an increase above the Contract Goal, but this increase was of contaminants that were not part of the accepted contaminant list that Mc2 had agreed to remediate (as discussed in more detail below).

ANSWER: The Trust admits that monitoring point P-2 showed an exceedance of total VOCs in groundwater above the Contract requirements in the March 2019 compliance sampling conducted by Ramboll but denies the remaining allegations in paragraph 23 of the Complaint.

24. Well P-2 met the Contract Goal based on the original nine-contaminant list, as had been outlined in the Design Proposal, and accepted by the Trust (the “Contracted VOCs”).

ANSWER: The Trust denies the allegations in paragraph 24 of the Complaint.

25. As a result of this recontamination or rebounding effect, McMillan restarted its ERH System on April 22, 2019, which operated until July 5, 2019.

ANSWER: The Trust admits only that McMillan had not achieved the required reduction in VOCs required by the Contract and that, as a result, McMillan restarted its ERH system on or about April 22, 2019 and that the operation of the system ended in July 2019. The Trust denies that there was “recontamination or rebounding effect” and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations. The Trust therefore denies the remaining allegations in paragraph 25 of the Complaint.

26. Mc2 tested groundwater in wells P-1 and P-2 on June 28 and August 2, 2019, respectively, and the results indicated that concentrations were again more than an order of magnitude below the Contract Goal for both wells.

ANSWER: The Trust admits that the Contract required confirmatory testing independent of McMillan, and specifically excluded compliance sampling by McMillan under Section 1.2 (iii) of the Contract, and that McMillan claimed that its own internal sampling in July and August 2019 purported to show that the required 90% reduction in total VOCs had been achieved. The Trust denies that the internal sampling by McMillan was accurate or reliable or conformed to the Contract for confirmatory sampling. The Trust also denies that McMillan’s internal sampling complied with the sampling requirements outlined in the Contract or that it showed that McMillan had achieved the required 90% reduction of total VOCs. The Trust denies all other allegations in paragraph 26 of the Complaint.

27. On September 5, 2019, however, further sampling from wells P-1 and P-2 was conducted and again revealed that a recontamination or rebounding effect had occurred in P-1.

ANSWER: The Trust admits that sampling independent of McMillan conducted on or about September 5, 2019 by Ramboll showed that the concentration of total VOCs at monitoring points P1 and P2 exceeded the levels required by the Contract and therefore showed that

McMillan had not achieved the 90% reduction of total VOCs in groundwater required by the Contract. The Trust denies all other allegations in paragraph 27 of the Complaint.

28. This recontamination or rebounding effect in P-1 was unexpected because contaminant rebound or recontamination is not associated with thermal remediation.

ANSWER: The Trust admits that the sampling conducted on September 5, 2019 showed that the concentration of total VOCs at monitoring point P-1 exceeded the levels required by the Contract and therefore showed that McMillan had not achieved the 90% reduction of total VOCs in groundwater required by the Contract. The Trust denies the remaining allegations in paragraph 28 of the Complaint.

29. In a site with poorly defined zones of contamination, however, a recontamination or rebounding effect may occur as a result of mass flux from outlying contaminated areas.

ANSWER: The Trust denies the allegation that the Site has “poorly defined” zones of contamination. The Trust denies that the September 5, 2019 sampling data were the results of “recontamination or rebounding effects” and the remaining allegations in paragraph 29 of the Complaint.

30. As a result of the recontamination or rebounding effect observed in September 2019, Mc2 believed that there a mass of contamination located outside the treatment area, which was communicated to the Trust on multiple occasions.

ANSWER: The Trust denies the asserted “recontamination or rebounding effect” and lacks knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 30 of the Complaint about what McMillan “believed.” The Trust admits that McMillan began to provide purported justifications for why it failed to achieve the 90% reduction of total VOCs required by the Contract. The Trust denies all other allegations in Paragraph 30 of the Complaint.

31. On November 12, 2019, McMillan advised the Trust in writing that it believed a contaminant mass below the DNAPL Area was causing the recontamination and advised the Trust that it considered this to be a fundamental difference within the meaning of the Contract.

ANSWER: The Trust lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31 of the Complaint about what McMillan “believed.” The Trust admits that McMillan sent a letter dated November 12, 2019, to the Trust in which McMillan attempted to justify its failure to achieve the contractually required remediation standards and asserted that a contaminant mass below the DNAPL area had re-contaminated monitoring wells P-1 and P-2 and that McMillan asserted that this was a “fundamental difference” within the meaning of the Contract, which assertions the Trust disagreed with. The November 12, 2019 letter speaks for itself.

32. On November 14, 2019, the Trust advised Mc2 in writing that it was considering declaring a Contractor Default and that Mc2’s ERH system was Defective within the meaning of the Contract.

ANSWER: The Trust admits the allegations of paragraph 32 of the Complaint. The November 14, 2019 letter speaks for itself.

33. In the November 14, 2019 communique, the Trust demanded immediate repayment of \$2,409,000.44 as well any losses and damages incurred by the Trust as a result of Mc2’s alleged failure to meet the Contract Goal.

ANSWER: The Trust admits that in the November 14, 2019 letter sent to McMillan that the Trust demanded “immediate repayment of the amounts paid to [McMillan] and payment for all of the Trust’s losses and damages resulting from or arising out of [McMillan]’s failure to achieve the required 90% reduction in total VOCs” required by the Contract and its failure to follow other instructions outlined by the Trust. To the extent that McMillan’s allegations in

paragraph 33 mischaracterize the terms of the November 14, 2019 letter, the Trust denies these allegations and further answers that the letter speaks for itself.

34. Mc2 restarted thermal operations in the vicinity of well P-1 on November 27, 2019.

ANSWER: The Trust admits that McMillan restarted its ERH system on or about November 27, 2019 and did so without notice to EPA or the Trust and without seeking the permission of the Trust or EPA, in violation of the Contract.

35. Following multiple exchanges of correspondence and conference calls with the Trust, Mc2 forwarded a sampling plan to the Trust on November 29, 2019.

ANSWER: The Trust admits that the Trust and McMillan exchanged correspondence and participated in conference calls in November 2019, and that McMillan submitted a purported sampling plan to the Trust on November 29, 2019. The Trust denies all other allegations in paragraph 35 of the Complaint.

36. The November 29, 2019 sampling plan would have permitted the parties to determine where the further contamination was coming from.

ANSWER: The Trust denies the allegation in paragraph 36 of the Complaint.

37. At the request/demand from the Trust, Mc2's sampling plan was revised and resubmitted on December 11, 2019.

ANSWER: The Trust admits that it asked McMillan to submit a revised sampling plan to correct deficiencies in its initial purported sampling plan and that McMillan submitted another purported sampling plan to the Trust on December 11, 2019. The Trust denies all other allegations in paragraph 35 of the Complaint.

38. On January 7, 2020, the Trust rejected the December 11, 2019 revised sampling plan as well.

ANSWER: The Trust admits that on January 7, 2020, it rejected McMillan's proposed revised sampling plan dated December 11, 2019.

39. Mc2 submitted a third sampling plan on January 10, 2020.

ANSWER: The Trust admits that McMillan submitted a proposed revised sampling plan on January 10, 2020, which was supposed to have corrected the many deficiencies in McMillan's prior sampling plans but denies that its January 10, 2020 sampling plan did so.

40. Mc2 ceased thermal operations in the vicinity of well P-1 at the direction of the Trust on January 16, 2020.

ANSWER: The Trust admits that McMillan turned off the ERH system on or about January 16, 2020 at the direction of the Trust because neither the Trust nor EPA had authorized McMillan to restart the ERH system, which restart was in violation of the Contract.

41. The January 10, 2020 sampling plan was also rejected by the Trust on January 17, 2020.

ANSWER: The Trust admits that on January 17, 2020, it rejected McMillan's proposed revised sampling plan dated January 10, 2020.

42. At that time, the Trust advised that it was retaining its own geotechnical consultants, Ramboll Environ ("Ramboll") and Geosyntec Consultants International Inc. ("Geosyntec") to provide sampling plans instead.

ANSWER: The Trust admits that on or about January 17, 2020, it informed McMillan that Ramboll and Geosyntec would prepare and implement an independent sampling plan. The Trust denies all other allegations in paragraph 42 of the Complaint.

43. The Trust proceeded to submit a new sampling plan from Geosyntec to the EPA on February 10, 2020.

ANSWER: The Trust admits that Geosyntec submitted on behalf of the Trust a sampling work plan to the EPA on or about February 10, 2020.

44. On February 21, 2020, Mc2 provided comments to the EPA and the Trust regarding Geosyntec's February 10, 2020 sampling plan.

ANSWER: The Trust admits that on or about February 21, 2020, McMillan sent a letter to the Trust, and copied an EPA representative, which provided unsolicited comments about Geosyntec's February 10, 2020 sampling plan. The February 21, 2020 communication speaks for itself.

45. On or about February 21, 2020, Mc2 also asked the EPA whether Mc2 would be permitted to conduct its own sampling at the Site.

ANSWER: The Trust admits that McMillan sent an email to EPA Remedial Project Manager Matthew Ohl asking if the EPA had any objection to McMillan obtaining its own data as outlined in its internal sampling plan. That email speaks for itself. The Trust denies the truth of the allegations asserted in the February 21, 2020 email.

46. The EPA advised on May 6, 2020 that it did not have any objections to Mc2 performing the further sampling it was requesting.

ANSWER: The Trust admits that the EPA responded to McMillan's email on May 6, 2020 stating that "[i]n general, [the EPA doesn't] have objections to additional data collection at the site," but denies the remaining allegations in paragraph 46 of the Complaint. The Trust also denies the inference that the EPA granted McMillan access to the Site to conduct further sampling on the Site.

47. On May 21, 2020, the Trust refused to allow Mc2 access to the Site for the purpose of conducting this further sampling.

ANSWER: The Trust admits that it did not allow McMillan to conduct its own sampling at the Site because among other things there was no access agreement between the Trust and McMillan allowing for such sampling and because McMillan had no right to conduct internal confirmatory sampling under the Contract and, instead, McMillan was only authorized to undertake operational testing or sampling while McMillan was operating the system. The Trust further avers that McMillan admitted in paragraph 40 of its Complaint that it ceased operating its ERH system on January 16, 2020. The Trust denies the remaining allegations in paragraph 47 of the Complaint.

48. On July 27, 2020, Mc2 advised the EPA what further testing Mc2 believed was necessary.

ANSWER: The Trust admits that McMillan sent an email to the Trust and the EPA on July 27, 2020, which stated McMillan's position about what additional sampling should be performed. The July 27, 2020 communication speaks for itself. The Trust lacks knowledge or information sufficient to form a belief as to the truth of the other allegation in paragraph 48 of the Complaint about what McMillan "believed was necessary" and therefore denies the allegation.

49. The EPA agreed with Mc2 that this further testing should be conducted, as proposed by McMillan.

ANSWER: The Trust denies the allegation in paragraph 49 of the Complaint.

50. The Trust, notwithstanding the EPA's direction, continued its refusal to allow Mc2 to conduct any sampling without an "Access Agreement."

ANSWER: The Trust admits that it did not allow McMillan to conduct sampling at the Site without an access agreement for the Site because McMillan had no right to conduct such

internal sampling under the Contract. The Trust denies the remaining allegations in paragraph 50 of the Complaint.

51. The Parties executed an Access Agreement on or about July 30, 2020.

ANSWER: The Trust admits the allegation in paragraph 51 of the Complaint.

52. Further testing was conducted from July 21 to August 13, 2020.

ANSWER: The Trust admits that Ramboll conducted independent soil and groundwater sampling at the Site during the summer of 2020 and that these samples were analyzed in a laboratory for total VOC contaminant impacts.

53. This testing revealed VOCs significantly in excess of the Contract Goal at 41 to 46 feet below ground surface (BGS) in groundwater samples, at concentrations indicative of the presence of DNAPL. Soil samples from the 41- to 46-foot BGS range had VOCs concentrations as high as thirty-nine times those from 0 to 40 feet BGS, exclusive of 1,2-DCB, defined below.

ANSWER: The Trust admits that Ramboll's independent testing confirmed the presence of VOCs in groundwater at the 41-46 BGS interval for which the EPA is requiring treatment. The Trust also admits that at one location concentrations were sufficient to indicate the presence of DNAPL at that location. The Trust further denies that soil values are an ERH Contract standard, denies information sufficient to form a belief as to McMillan's computations and further avers that Ramboll's independent testing and the Trust's post-ERH investigation confirmed that the location where such DNAPL contaminant concentrations in groundwater were identified did not correspond to locations P1 or P2 and could not explain McMillan's failure to achieve the Contract cleanup objectives as McMillan has contended, but rather indicated that McMillan had negligently designed, installed and operated the ERH infrastructure and is responsible for the spread of contaminants, thereby damaging the Site.

54. Further, contaminant concentrations from groundwater samples collected immediately below the DNAPL Area also exceeded the Contract Goal.

ANSWER: The Trust admits that groundwater samples collected by Ramboll's independent sampling at the 41-46 BGS interval revealed the presence of VOCs for which the EPA is requiring treatment. The Trust further avers that Ramboll's independent testing and the Trust's post-ERH investigation confirmed that these groundwater conditions were identified at locations that did not correspond to P1 or P2 and could not explain McMillan's failure to achieve the Contract cleanup objectives, but rather indicated that McMillan had negligently installed the ERH infrastructure and is responsible for the spread of contaminants, thereby damaging the Site.

V. FUNDAMENTAL CHANGE TO THE CONTRACT

55. Full and accurate delineation of the extent of contamination, prior to commencement of thermal remediation, is critical to ensure that the heated soil volume will encompass soil and groundwater with unacceptably high contamination levels.

ANSWER: The Trust lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 55 of the Complaint and therefore denies such allegations.

56. The DNAPL Site as defined in the Contract was to a depth of 40 feet.

ANSWER: The Trust denies that the "DNAPL Site as defined in the Contract was to a depth of 40 feet."

57. Outside mass was found at depths of 41-46 feet BGS.

ANSWER: The Trust admits that contaminant concentrations in groundwater samples collected at the 41-46 BGS interval revealed the presence of VOCs in sufficient concentrations at one location to constitute DNAPL. The Trust further answers that the testing and the Trust's

independent post-ERH investigation showed that that location did not correspond to P-1 or P-2 and could not explain McMillan's failure to achieve the Contract cleanup objectives, but rather indicated McMillan had negligently designed, installed and operated the ERH infrastructure and is responsible for the spread of contaminants, thereby damaging the Site. The Trust denies that an "outside mass" of contamination was discovered at 41-46 BGS, as McMillan's use of the term "outside mass" suggests that this contamination existed at this depth before McMillan's negligent design, installation and operation of the ERH system. The Trust denies this allegation.

58. In order to properly remediate an area using thermal remediation, it is imperative that the area be properly delineated.

ANSWER: The Trust lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 58 of the Complaint and therefore denies such allegations.

59. It was evident from these sampling results that the original Site delineation was incorrect.

ANSWER: The Trust denies the allegation in paragraph 59 of the Complaint.

60. Accordingly, the desired remediation could not be achieved.

ANSWER: The Trust denies the allegation in paragraph 60 of the Complaint.

61. Mc2 advised the Trust in writing on November 12, 2019 that this outside contamination was a fundamental difference within the meaning of clause 7.2 of the Contract that would require an adjustment to the Contract Price.

ANSWER: The Trust answers that the November 12, 2019 letter speaks for itself. The Trust denies all other allegations in paragraph 61 of the Complaint.

62. Mc2 further advised that Clauses 7.1 and 7.2 of the Contract stipulate that where site conditions differ from what was distributed in the Invitation to Prequalify for the Contract, there may be an adjustment to the Contract Price.

ANSWER: The Contract and the November 12, 2019 letter speak for themselves. The Trust denies all other allegations in paragraph 62 of the Complaint.

63. This stipulation regarding outside contamination was reiterated at clause 3.2.1 (8) of Mc2's Design Proposal in which Mc2 noted specifically that (1) it would not be held responsible for any contaminants outside of the treatment zone and (2) any additional decontamination required due to such contaminants would require a Change Order.

ANSWER: To the extent paragraph 63 of the Complaint alleges legal conclusions, no response is required. To the extent a response is necessary, the Trust denies that McMillan's Design Proposal was accepted by EPA or the Trust and denies that that proposal is a Contract Document. The Trust denies the remaining allegations in paragraph 63 of the Complaint.

64. This communication from Mc2 was met with a demand from the Trust for immediate repayment of \$2,409,000.44 as well any losses and damages incurred by the Trust as a result of Mc2's alleged failure to meet the Contract Goal.

ANSWER: The Trust admits that in its November 14, 2019 letter to McMillan the Trust demanded "immediate repayment of the amounts paid to [McMillan] and payment for all of the Trust's losses and damages resulting from or arising out of [McMillan]'s failure to achieve the required 90% reduction in total VOCs" and its failure to follow other instructions outlined by the Trust. To the extent McMillan mischaracterizes the terms of the November 14, 2019 letter, the Trust denies these allegations.

65. Sampling conducted in July and August 2020 confirmed the contamination below the DNAPL Area.

ANSWER: The Trust denies the allegation in paragraph 65 because it is incomplete and misleading. The Trust incorporates its answers to paragraphs 53, 54 and 57.

66. Mc2 has advised the Trust that this lower contamination requires further thermal remediation.

ANSWER: The Trust admits that McMillan has asserted this claim, but the Trust denies that the lower contamination requires further ERH thermal remediation.

67. On June 2, 2021, the EPA also advised that it would be preferable that further thermal remediation be used to remove these lower contaminants and that bioremediation would be more appropriately considered after further thermal remediation.

ANSWER: The Trust admits that the EPA and the Trust, along with the Trust's environmental consultants, have engaged in discussions about the remedial approach to the Site following McMillan's failure to achieve the 90% reduction in total VOCs as required by the Contract. The Trust denies that any final decision has been made on whether any additional thermal remediation will be needed.

68. The Trust, however, has chosen to proceed with bioremediation instead, and purportedly terminated the Contract on June 1, 2021.

ANSWER: The Trust admits that it terminated the Contract on June 1, 2021, with the termination effective 5 days after McMillan's receipt of the termination letter. The Trust denies the remaining allegations in paragraph 68 of the Complaint.

VI. REFUSAL TO ALLOW Mc2 TO REMOVE EQUIPMENT WITHOUT ANY CONTRACTUAL OR OTHER AUTHORITY

69. On November 12, 2019, Mc2 advised the Trust in writing that the remaining treatment areas were localized to the area around P1 and did not require all of Mc2 equipment to remain on Site.

ANSWER: The Trust admits that on November 12, 2019, McMillan sent a letter to the Trust stating McMillan's position that the "remaining contamination was minimal and restricted to the area around P1" and that it planned to demobilize some of its equipment. That letter speaks for itself. The Trust denies all remaining allegations in paragraph 69 of the Complaint.

70. Mc2 further advised that much of its equipment could be removed as it was no longer necessary and that any future soil vapor and groundwater treatment could be performed using a skid-mounted vacuum blower, vacuum lift pump, and activated carbon treatment system. This would provide much better well field access, and would eliminate a large amount of grossly overcapacity equipment, which was no longer required.

ANSWER: The Trust admits that on November 12, 2019, McMillan sent a letter to the Trust stating McMillan's position that the "remaining contamination was minimal and restricted to the area around P1" and that it planned to demobilize some of its equipment. That letter speaks for itself. The Trust denies all remaining allegations in paragraph 70 of the Complaint.

71. The Trust's response to this correspondence was to hire security to ensure that Mc2 was unable to remove its equipment.

ANSWER: The Trust denies the allegations in paragraph 71 of the Complaint and denies that McMillan has the right to remove the equipment.

72. The Trust has failed to exercise due care in maintaining the property or the equipment.

ANSWER: To the extent paragraph 72 of the Complaint alleges legal conclusions, no response is required. To the extent a response is necessary, the Trust denies the allegation in paragraph 72 of the Complaint.

73. There is no contractual or other right of the Trust to withhold this equipment.

ANSWER: To the extent paragraph 73 of the Complaint alleges legal conclusions, no response is required. To the extent a response is necessary, the Trust denies the allegation in paragraph 73 of the Complaint.

74. Mc2 has incurred damages and will continue to incur damages as a result of the Trust withholding this equipment and failing to exercise due care in maintaining same while impounding it.

ANSWER: To the extent paragraph 74 of the Complaint alleges legal conclusions, no response is required. To the extent a response is necessary, the Trust denies the allegation in paragraph 74 of the Complaint.

VII. 1, 2 – DICHLOROBENZENE (“1,2-DCB”)

75. The Trust alleges that Mc2 did not meet the Contract Goal 1,2-DCB should be included as one of the VOC’s that Mc2 was required to remediate.

ANSWER: The Trust admits that the Contract required McMillan to reduce total VOCs, including 1,2-DCB, by more than 90% and that McMillan failed to meet its Contract Goal.

76. 1,2-DCB is a semi volatile organic compound (SVOC) that may not be successfully remediated by ERH due to its high boiling point, high water co-boiling temperature (97.8°C), and low corresponding vapor pressure at this temperature.

ANSWER: The Trust denies the allegations in paragraph 76 of the Complaint.

77. The Trust’s Request for Proposal for the ERH project included the water data which indicated the VOCs that were being targeted at the Site. 1,2-DCB is not one of the chemicals that is listed.

ANSWER: To the extent paragraph 77 of the Complaint alleges legal conclusions, no response is required. To the extent a response is necessary, the Trust denies the allegations in paragraph 77 of the Complaint and further avers that the the “water data” provided to McMillan and that is referenced in its Final Design Report dated April 23, 2018 indicated that 1,2-DCB was a VOC present in the groundwater at the Site. Furthermore, the Trust denies that McMillan was not aware of its obligation to reduce total VOCs in groundwater, including 1,2-DCB, by 90%.

78. The Contract between the Third Site Trust and Mc2 does not include any definition of volatile organic compounds or VOCs in Article 18, Definitions, or in any other portion of the Contract.

ANSWER: To the extent paragraph 78 of the Complaint alleges legal conclusions, no response is required. To the extent a response is necessary, the Trust denies the allegations in paragraph 78 of the Complaint.

79. The Contract incorporates the following relevant technical documents:

- (a) The Consent Order including the EAM;
- (b) The Environ 2004 Design Report for Non Time-Critical Removal Action at Third Site, Second Revision; and,

ANSWER: To the extent paragraph 79 of the Complaint alleges legal conclusions, no response is required. To the extent a response is necessary, the Trust admits that all such documents speak for themselves. The Trust further answers that the Contract Documents include the Consent Order dated November 21, 2002, the Enforcement Action Memorandum dated May 11, 2001, the Environ 2004 Design, and the Accepted Design for ERH prepared by Contractor after EPA approval of that design among the other documents listed in Section 20.1 of the Contract. The Trust further avers that the Accepted Design for ERH prepared by Contractor that was approved by EPA, dated April 23, 2018, references documents that expressly include 1,2 – DCB as one of the total VOCs that McMillan contractually agreed to reduce by 90% in groundwater. The Trust further avers that McMillan routinely sampled, as part of its operational sampling, for 1,2-DCB, characterized 1,2 – DCB as a VOC compound that was part of the total VOCs in several of McMillan’s monthly ERH progress reports that were submitted to the Trust and to the EPA.

80. The Consent Order, attached hereto as **Exhibit C**, states:

Six VOCs were identified as the contaminants of concern based on historic and recent sampling at the site. The following compounds were found in site soil and groundwater: tetrachloroethene (PCE), trichloroethene (TCE), cis-1,2 dichloroethene (cis-1,2 DCE), vinyl chloride, Trans-1,2 dichloroethene (Trans-1,2 DCE), and 1,1-Dichloroethene.

Exhibit C, ¶6, p. 5,

ANSWER: The Trust admits that the 2002 Consent Order includes, among other things, this quoted statement but denies that this statement in any way alters McMillan's obligation under its 2016 ERH Contract to reduce total VOCs, including 1,2-DCB, in the DNAPL Area by greater than 90%.

81. The Consent Order does not list 1,2-DCB in the contaminants of concern.

ANSWER: The Trust admits that the 2002 Consent Order does not specifically list 1,2-DCB as one of the contaminants of concerns that were identified in sampling conducted at the Site in or before 2000 but denies that this in any way alters McMillan's obligation under the 2016 ERH Contract to reduce total VOCs, including 1,2-DCB, in the DNAPL area and in the Additional Thermal Treatment Zone by greater than 90%.

82. The Enforcement Action Memorandum, attached hereto as **Exhibit D**, states:

VOCs identified as the contaminants of concern based on their occurrence in soil (measured in ug/kg) and/or groundwater (measured in ug/l), and their maximum concentrations are as follows: tetrachloroethene (330,000 ug/kg, 36 ugh); trichloroethene (350,000 ug/kg, 870 ug/l); cis-1,2-dichloroethene (130,000 ug/kg, 29,000 ug/l); vinyl chloride (4,800 ug/kg, 860 ug/l); trans-1,2-dichloroethene (930 ug/kg, 100 ug/l); 1,1,1-trichloroethane (49,000 ug/kg, 5,800 ug/l); 1,1,2-trichloroethane (ND,12 ug/l); 1,1-dichloroethane (23,000 ug/kg, 780 ug/l); and 1,1-dichloroethene (100 ug/kg, 160 ug/l)."

Exhibit D, p. 4

ANSWER: The Trust admits that the 2001 EAM includes, among other things, this quoted statement but denies that this quote is complete or in context. The Trust further avers that in its Remedial Design Report, dated April 23, 2018, McMillan admitted in Section 1.5.2, footnote 1 that “Remedial Objectives for the DNAPL Area are identified in Section VI.a of the May 11, 2001 USEPA EAM. These objectives have been subsequently clarified in USEPA approved documents prepared by Environ including the March 17, 2004 Design Report for the Non-Time Critical Removal Action at Third Site-2nd Revision (Section II.C.5) (Environ 2004), January 2005 base line sampling data, February 20, 2008 Memorandum In Situ Chemical Oxidation Confirmatory Ground Water Sampling DNAPL Containment Area from Environ to EPA (Environ 2008A) and December 31, 2008 Proposed Confirmatory Ground Water Sampling memorandum (Environ 2008B).” The Trust further admits that several of these documents, including, the 2005 Base Line Sampling Data, Environ 2008A and Environ 2008B, all include 1,2 – DCB as one of the total VOCs that were present in groundwater in the DNAPL Area, which McMillan was contractually obligated to reduce by 90%.

83. The EAM does not mention 1,2-DCB.

ANSWER: The Trust incorporates its above Answer to paragraph 82 of the Complaint.

84. The 2004 Environ Design Report for Non Time-Critical Removal Action at Third Site, Second Revision includes the same nine contaminants of concern identified in the EAM.

ANSWER: The Trust admits that the 2004 Environ Design Report for Non Time-Critical Removal Action at Third Site, Second Revision includes nine contaminants of concern identified in the EAM which were identified in sampling conducted at the Site in or before 2000 but denies that this in any way alters McMillan’s obligation under the Contract to reduce total

VOCs, including 1,2-DCB, in the DNAPL area and Additional Thermal Treatment Zone by greater than 90% in groundwater.

85. Nowhere in the text of the 2004 Environ Design Report does 1,2-DCB appear.

ANSWER: The Trust denies the allegations in paragraph 85 of the Complaint. The Trust further answers that the 2004 Environ Design Report states that total VOCs used to verify cleanup objectives will include the VOCs from the Target Compound List (TCL) VOCs, which included 1,2-DCB and would be determined by future sampling.

86. Further, Mc2's Design Proposal lists the same nine contaminants of concern (tetrachloroethene, trichloroethene, cis-1,2-dichloroethene, vinyl chloride, trans-1,2-dichloroethene, 1,1,1-trichloroethane, 1,1,2-trichloroethane, 1,1-dichloroethane, and 1,1-dichloroethene) in Table 4.

ANSWER: The Trust admits that McMillan's Design Proposal references VOCs in Table 4, but denies that the Design Proposal was accepted by EPA or the Trust and denies that it is a Contract Document.

87. Mc2's Design Proposal explicitly excludes 1,2-DCB.

ANSWER: The Trust denies the allegation in paragraph 87 of the Complaint. The Trust incorporates its answers to paragraph 84 through 86 of the Complaint.

88. The Design Proposal was accepted by the Trust and the EPA.

ANSWER: The Trust denies that the Design Proposal was accepted by the Trust or USEPA and admits that what was approved was McMillan's Remedial Design Report – Installation, Operation and Maintenance of ERH at Third Site, Zionsville, Indiana, dated April 23, 2018, The Trust denies the remaining allegations in paragraph 88 of the Complaint.

89. The contaminants of concern to be included in the Contract did not include 1,2-DCB.

ANSWER: The Trust denies the allegation in paragraph 89 of the Complaint.

90. VOC concentrations must be calculated with 1,2-DCB omitted.

ANSWER: The Trust denies the allegation in paragraph 90 of the Complaint.

COUNT 1: BREACH OF CONTRACT/FUNDAMENTAL CHANGE

91. Plaintiff incorporates by reference the material factual allegations contained in paragraphs 1-90, *supra*, as though fully stated herein.

ANSWER: The Trust incorporates its Answers to paragraphs 1-90 as though fully stated herein.

92. On October 20, 2020, following confirmation of the outside contamination, Mc2 asked the EPA for an Amended Enforcement Action Memorandum that altered the conditions or obligations applicable to the site DNAPL area, in accordance with the Contract, so Mc2 would be compensated for the fundamental changes in known conditions.

ANSWER: The Trust admits that on or about October 20, 2020, McMillan sent EPA Remedial Project Manager Matthew Ohl a document titled “Re: Third Site DNAPL Area Supplemental Sampling Report.” This document speaks for itself. The Trust denies the remaining allegations in paragraph 92 of the Complaint and admits that the EPA has never issued an ESD as to the DNAPL Area at the Site.

93. Mc2 was and continues to be motivated to remediate the Site, which it has now confirmed includes contaminant mass below the Treatment Zone.

ANSWER: The Trust lacks knowledge of McMillan’s mental processes and motivations. However, McMillan’s conduct following the failure of its ERH system, including but not limited to inventing excuses for its failure, the surreptitious and unauthorized re-starting of the ERH system at the end of 2019, the filing of this lawsuit and its motion to remove its ERH

equipment at the Site, is inconsistent with the allegations in paragraph 93, and therefore the Trust denies the allegations in paragraph 93 of the Complaint.

94. The Trust has refused to permit Mc2 to finish the remediation.

ANSWER: The Trust denies the allegation in paragraph 94 of the Complaint and further avers that it has repeatedly requested McMillan to “finish the remediation.” The Trust further answers that based on subsequent testing and McMillan’s conduct, the Trust concluded that McMillan was incapable of satisfactorily finishing the remediation at the Site. McMillan has breached the Contract, as detailed in the Trust’s Counterclaims, and because of these breaches the Trust terminated the Contract on June 1, 2021.

95. Mc2 fully and completely fulfilled all of its obligations under the Contract with the exception of demobilizing its equipment.

ANSWER: The Trust denies the allegations in paragraph 95 of the Complaint.

96. The Trust has prevented Mc2 from demobilizing its equipment.

ANSWER: The Trust denies the allegations in paragraph 96 of the Complaint because, among other things, McMillan has no right to demobilize its equipment under the Contract and that McMillan never achieved the cleanup it contracted to achieved.

97. Mc2 provided services in accordance with the Contract and surpassed the Contract Goal.

ANSWER: The Trust denies the allegations in paragraph 97 of the Complaint.

98. The Trust has breached the Contract by failing to properly delineate the Site in the first instance and also frustrated the Contract by refusing to allow Mc2 to address the contamination outside the DNAPL Area.

ANSWER: The Trust denies the allegations in paragraph 98 of the Complaint.

99. Mc2 has performed all of its obligations under the Contract.

ANSWER: The Trust denies the allegations in paragraph 99 of the Complaint.

COUNT 2: CONVERSION

100. Plaintiff incorporates by reference the material factual allegations contained in paragraphs 1-99, *supra*, as though fully stated herein.

ANSWER: The Trust incorporates its answers to paragraphs 1-99 as though fully stated herein.

101. Further, the Trust has breached its obligations under the Contract by failing to allow Mc2 to remove its equipment from the Site and by improperly withholding the equipment without any contractual or other right to do so, thereby converting the equipment to its own use.

ANSWER: The Trust denies the allegations in paragraph 101 of the Complaint.

102. Notwithstanding its requests to be permitted to remove its equipment, the Trust has not only refused but actively prevented Mc2 from doing so.

ANSWER: The Trust denies the allegations in paragraph 102 of the Complaint.

103. A person who knowingly or intentionally exerts unauthorized control over property of another person commits criminal conversion.

ANSWER: Paragraph 103 of the Complaint alleges legal conclusions, to which no response is required.

104. As a result of the Trust's conversion, Mc2 has sustained actual damages exceeding \$3,000,000, as outlined in more particularity below.

ANSWER: The Trust denies the allegations in paragraph 104 of the Complaint.

105. Mc2 seeks damages for civil and criminal conversion.

ANSWER: The Trust denies that McMillan is entitled to any damages for civil and criminal conversion.

106. The Trust has acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error of judgment, overzealousness, mere negligence, or other human failing.

ANSWER: The Trust denies the allegations in paragraph 106 of the Complaint.

107. As a result of its malicious, fraudulent, and oppressive behavior and actions, the Trust should be punished and subjected to punitive damages for the purpose of preventing it and others situated from engaging in the same or similar conduct in the future.

ANSWER: The Trust denies the allegations in paragraph 107 of the Complaint.

108. To the extent not duplicative with a recovery of punitive damages, pursuant to Ind. Code §34-24-3-1, Mc2 seeks three times the actual damages suffered as a result of the Trust's conversion, the costs of this action, reasonable attorney's fees, and all other damages recoverable under I.C. §34-24-3-1 *et seq.*

ANSWER: The Trust denies the allegations in paragraph 108 of the Complaint and denies that McMillan is entitled to the damages it seeks.

COUNT 3: UNJUST ENRICHMENT

109. Plaintiff incorporates by reference the material factual allegations contained in paragraphs 1-108, *supra*, as though fully stated herein.

ANSWER: The Trust incorporates its answers to paragraphs 1-108 as though fully stated herein.

110. In the alternative, the Trust has been unjustly enriched by its failure to pay for work carried out by Mc2 for the benefit of the Trust.

ANSWER: The Trust denies the allegations in paragraph 110 of the Complaint.

111. As a result of the recontamination or rebounding effect that occurred at the Site, through no fault of Mc2, Mc2 conducted further remediation at the Site from April to August 2019, and again from November 2019 to January 2020, entirely at its own cost.

ANSWER: The Trust denies the allegations in paragraph 111 of the Complaint.

112. The Trust received a benefit from these expenditures and services.

ANSWER: The Trust denies the allegations in paragraph 112 of the Complaint.

113. Mc2 has been correspondingly deprived.

ANSWER: The Trust denies the allegations in paragraph 113 of the Complaint.

114. There is no juristic reason to permit Third Site to be enriched in this manner.

ANSWER: The Trust denies that it has been enriched as alleged in paragraph 114 of the Complaint.

115. Mc2 claims damages for unjust enrichments for these extended operations, as outlined in more detail below.

ANSWER: The Trust denies the allegations in paragraph 115 of the Complaint and denies that McMillan is entitled to the damages it seeks.

116. Alternatively, Mc2 seeks damages for unjust enrichment on a *quantum meruit* basis.

ANSWER: The Trust denies the allegations in paragraph 116 of the Complaint and denies that McMillan is entitled to the damages it seeks.

COUNT 4: IMMEDIATE POSSESSION PURSUANT TO I.C. §32-35-2-1 ET SEQ.

117. Plaintiff incorporates by reference the material factual allegations contained in paragraphs 1-116, *supra*, as though fully stated herein.

ANSWER: The Trust incorporates its answers to paragraphs 1-116 as though fully stated herein.

118. Plaintiff's personal property is being held at the site of the project by Defendant.

ANSWER: The Trust denies the allegations in paragraph 118 of the Complaint.

119. Plaintiff's personal property is being wrongfully detained by Defendant.

ANSWER: The Trust denies the allegations in paragraph 119 of the Complaint.

120. Defendant refuses to provide justification for such wrongful detention of Plaintiff's personal property.

ANSWER: The Trust denies the allegations in paragraph 120 of the Complaint.

121. Plaintiff's equipment contains highly corrosive chemicals that are not suited to sit idle for two years.

ANSWER: The Trust lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 121 of the Complaint and therefore denies such allegations.

122. Plaintiff experiences irreparable harm and will continue to suffer and experience said harm daily, as a direct and proximate result of the actions and inactions of Defendant, including wrongfully detaining said property.

ANSWER: The Trust denies the allegations in paragraph 122 of the Complaint.

123. Plaintiff is entitled to immediate possession of such personal property.

ANSWER: The Trust denies the allegations in paragraph 123 of the Complaint.

VIII. DAMAGES:

124. Mc2 continues to accrue damages as a result of the Trust's refusal to allow Mc2 to remove its equipment from the Site.

ANSWER: The Trust denies the allegations in paragraph 124 of the Complaint.

125. As a result of the Trust's actions as described above, Mc2 has suffered damages as follows:

(a)	Minor Subcontractor Costs	\$60,396.74
(b)	MK Environmental Continued Costs	\$1,750,486.41
(c)	Sampling/Waste Costs	\$16,321.14
(d)	Rental Costs	\$130,734.66
(e)	Energy Costs	\$75,588.70
(f)	Shipping Costs	\$3,379.57
(g)	Extended Operations/Other Costs	\$6,302.04
(h)	Legal Costs	\$10,213.03
(i)	Labor Costs	\$154,199.27
(j)	Travel Costs	\$10,301.51
(k)	Mc2 Equipment Costs	\$800,280.00
	TOTAL:	\$3,018,203.

ANSWER: The Trust denies the allegations in paragraph 125 of the Complaint.

126. Mc2 reserves its right to amend its claim to include additional damages, including but not limited to losses for damaged equipment or other harm that may have been caused by the Trust's refusal to allow Mc2 to remove its equipment and its conversion of same to Mc2 detriment.

ANSWER: The Trust denies the allegations in paragraph 126 of the Complaint.

127. Mc2, pursuant to Fed. R. Civ. P. 38(b), demands that this matter be tried to a jury on all issues so triable.

ANSWER: To the extent paragraph 127 of the Complaint alleges legal conclusions, no response is required.

WHEREFORE, Mc2 seeks immediate possession of all personal property rightfully belonging to Plaintiff that is being wrongfully detained; judgment for damages for breach of contract in the amount of US \$3,018,203.07 in addition to amounts that continue to accrue until Mc2 is permitted to remove its equipment from the Site; pre-judgment interest in the amount of 10% per annum accruing from the earliest allowable time; post-judgment interest in the amount of 8% per annum or otherwise allowed pursuant to 28 U.S.C. §1961; treble damages, attorney fees, and all other damages allowed pursuant to I.C. §34-24-3-1; punitive damages to the extent not duplicative of damages recoverable under I.C. §34-24-3-1 in an amount sufficient to deter the Trust and others similarly situated from engaging in the same or similar conduct; for the costs of this action; and for all other relief just under the premises.

ANSWER: To the extent McMillan's "Wherefore" clause alleges legal conclusions, no response is required. The Trust denies that McMillan is entitled to any of the relief it seeks and denies that McMillan has suffered any damages.

DEFENSES AND AFFIRMATIVE DEFENSES

The Third Site Trust, as Defendant and Counterclaim Plaintiff, asserts the following defenses, for which the Trust may or may not have the burden of proof. The Trust has undertaken in good faith to list all of the defenses that it is currently aware of that it may have with respect to McMillan's claims against it. However, the Trust reserves its right to re-evaluate, restate, delete, and assert additional defenses.

1. The Complaint fails to state a claim upon which relief can be granted.
2. McMillan committed material breaches of the ERH Contract, and as the first to breach, McMillan cannot enforce the terms of the ERH Contract.
3. Any recovery against the Trust must be reduced by payments already made by the Trust to McMillan in excess of Two Million One Hundred Thousand Dollars (\$2,100,00) and the additional costs incurred and to be incurred by the Trust to investigate and remediate the

remaining contamination at the Site after McMillan's defective system failed to achieve the contractually agreed upon reduction of total VOCs in groundwater.

COUNTERCLAIMS

Parties, Jurisdiction, and Venue

1. Counterclaim Plaintiff Third Site Trust Fund is a trust established pursuant to the laws of the State of New York.

2. McMillan-McGee Corporation is a Canadian Corporation incorporated in the Province of Alberta.

3. The amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

4. Complete diversity of citizenship between McMillan and the Trust exists because McMillan is a Canadian corporation and the Trust is a trust established under the laws of New York, and the two trustees of the Trust, Norman W. Bernstein and Peter M. Racher, are citizens of New York and Indiana, respectively.

5. Jurisdiction in this Court is therefore proper pursuant to 28 U.S.C. § 1332(a)(2).

6. This is the proper venue under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred and the property that is the subject of the action is situated in Boone County, Indiana.

BACKGROUND

7. Third Site ("Third Site" or the "Site") is the name given by the U.S. Environmental Protection Agency ("EPA") to a tract of land located immediately adjacent to U.S. Highway 421 approximately five miles north of Zionsville, Indiana, and immediately north of Finley Creek.

8. Upon information and belief, Third Site was used in the late 1970s and early 1980s by the then owners and operators for the temporary staging and storage of waste industrial liquids as part of a now defunct business, the Enviro-Chem Corporation, that had been engaged in brokering and recycling industrial waste liquids. Waste liquids were spilled or otherwise released into the environment at Third Site. The resulting contaminant impacts are the subject of an ongoing EPA-led investigation and environmental cleanup pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq.

9. The Third Site Trust Fund (the “Trust”) was created in 1999 and amended in 2002 pursuant to orders of the EPA to investigate and fund the cleanup to respond to the environmental conditions at Third Site.

The Electrical Resistance Heating Contract

10. In October 2016 the Trust entered into a contract with McMillan (the “ERH Contract” or the “Contract”) that required McMillan to perform and complete work at Third Site (the “Site”). A true and complete copy of the Contract is attached as **Exhibit 1**. This work included, among other items, designing, installing, operating, and maintaining an electrical resistance heating (“ERH”) system “to achieve a reduction in the concentration of total volatile organic compounds (“VOCs”) in groundwater in the Third Site DNAPL [dense non-aqueous phase liquids] area to a depth of forty (40) feet and in the small ATT [Additional Thermal Treatment] zone outside the sheet pile wall, by greater than 90% at both locations.” [Ex. 1, § 1.1.1. and Ex. § 1.1.5]

11. The ERH Contract required, among other obligations, that McMillan prepare a Remedial Action Work Plan (the “Work Plan”), revise the Work Plan to address EPA’s comments on the Work Plan, complete an ERH Design Package for submission to the EPA upon

approval of the Work Plan, revise the ERH Design Package to address the EPA's comments on the ERH Design Package, and design, install, and operate and maintain an ERH system upon the EPA's approval of the Design Package. [Ex. 1, § 1.1.1 – 1.1.5.]

12. Section 1.1.6 of the ERH Contract states that McMillan's obligations are not complete "until EPA approval of the performance of all of the Work is received[.]" [Ex. 1, § 1.1.6.]

13. The ERH Contract states that if the EPA has agreed that, as a result of sampling, the cleanup objectives set forth in § 1.1.1 and § 1.1.5 have been met, a second round of sampling taken at least ninety days thereafter must be done to confirm achievement of those cleanup objectives. [Ex. 1., § 1.1.7.]

14. Under the ERH Contract, McMillan has no right to remove equipment until after the cleanup objectives have been confirmed through the sampling procedure outlined in § 1.1.6 of the ERH Contract and until EPA approval of the performance of all of the Work is received. [Ex. 1, § 1.1.7.]

15. No such approval of the performance of all of the Work required of McMillan under the Contract has been issued by EPA.

16. The ERH Contract expressly requires the Contractor, McMillan, as the expert on thermal treatment technology, to thoroughly familiarize itself with all relevant Site-related environmental investigation documents and all local conditions and to be responsible for Site conditions to ensure that the Contract cleanup objectives (90% reduction in total VOCs in groundwater as measured at specified compliance points) will be achieved. The Contract states in Section 4.1:

In order to induce the Trust to enter into this Contract, Contractor makes the following representations, upon which the Trust has relied in entering into this Contract:

4.1.1 Contractor has obtained and carefully studied (where applicable), and has fully and carefully inspected and/or is familiar with, the Consent Order including the EAM, the Work, Site, locality, and all local conditions and Laws and Regulations that in any manner may affect cost, progress, performance, furnishing or completion of the Work. In this connection, Contractor acknowledges that Contractor has consulted with and obtained advice of legal counsel regarding environmental Laws and Regulations and the Consent Order.

4.1.2 Contractor has obtained and carefully studied (or assumed responsibility for obtaining and carefully studying) all such examinations, investigations, explorations, tests, reports and studies which pertain to the surface or subsurface at or contiguous to the Site, including without limitation availability of utilities, storage and parking, or which otherwise disclose conditions which may affect the cost, progress, performance, furnishing or completion of the Work as Contractor considers necessary for the performance or furnishing of the Work at the Contract Price, within the Contract Time and in accordance with the other terms and conditions of the Contract Documents, subject to the provisions of Sections 7.2, 7.2A and 7.3 of the Contract, Contractor agrees to accept the conditions of the Site "as is" and Contractor assumes all liability, risk and responsibility with respect thereto.

4.1.3 Contractor has fully reviewed the Contract Documents before bidding. Prior to submission of its bid, Contractor gave the Trust written notice of any and all conflicts, errors or discrepancies in the Contract Documents and the written resolution thereof is acceptable to the Contractor. No changes in the Contract Documents will be required by Contractor or granted by the Trust in order to perform and furnish the Work at the Contract Price, within the Contract Time and in accordance with the other terms and conditions of the Contract Documents. In addition to the foregoing, both parties shall have a continuing obligation to advise the each other of any conflicts, errors or discrepancies in the Contract Documents which either of them shall discover after the date of this Contract, but no such subsequently discovered conflicts, errors or discrepancies shall affect Contractor's obligation to perform and furnish the Work at the Contract Price in accordance with the other terms and conditions of the Contract Documents or any of Contractor's other obligations under the Contract Documents.

4.1.4 Contractor has correlated to Contractor's satisfaction the results of all its observations, examinations, investigations, explorations, tests, and reports.

17. McMillan advised the Trust that its ERH system would easily meet and likely would exceed the cleanup objective -- that is, would reduce total VOC concentrations in groundwater by more than 90%. Accordingly, the ERH Contract authorizes McMillan to potentially earn a bonus if VOC concentrations were reduced by 98% or more. [Ex. 1, ERH Contract, Section 3.2.]

McMillan's design, installation, operation, and maintenance of the ERH system

18. McMillan prepared and submitted several plans to the EPA, including a Remedial Design Report, sampling and analysis plans, a monitoring plan, a site management plan and a quality assurance plan. The final McMillan Remedial Design Report prepared by McMillan, dated April 23, 2018 (the "Final Design Report"), is a Contract Document. [Ex. 1, ERH Contract, Section 20.1.7]. A true and complete copy of the Final Design Report is attached as **Exhibit 2**.

19. On or about the time of EPA's final authorization to McMillan to proceed, McMillan began installation of its ERH system.

20. Subsequent investigation and analysis has shown that as part of the design and installation process, McMillan failed to properly install and operate the ERH system.

21. The vapor extraction wells and electrode penetrations were not properly installed.

22. McMillan's improper design and installation of the ERH system created preferential pathways for downward contaminant migration.

23. These vapor extraction wells and electrodes penetrated VOC contamination, which taken together with its operation of the ERH system allowed contamination to mobilize downward below the 40-foot treatment area.

24. It took McMillan approximately two months to finish installing the ERH system, and another approximately four months to start heating the subsurface and extracting vapors from the subsurface.

25. During this period of approximately six months and thereafter due to insufficient heating and vapor extraction, McMillan facilitated the migration of VOCs downward below the 40-foot treatment area.

26. McMillan's system failed in several ways. McMillan's improper design, operation and installation of its ERH system contributed to the spread of contamination, which made the contamination problem worse at the Site. Additionally, McMillan's remedial system did not achieve the 90% reduction of total VOCs in the groundwater.

27. McMillan shut down the ERH system on January 24, 2019, based on its field measurements and internal sampling, which it claimed indicated that the cleanup objectives in the ERH Contract had been achieved.

28. Ramboll in or about March 2019 independently conducted post-ERH shutdown groundwater compliance sampling to determine if McMillan had achieved the cleanup objectives in the ERH Contract.

29. In or about April 2019, Ramboll reported that its sampling results showed that the cleanup objectives under the ERH Contract had not been achieved at monitoring points P-1, P-2, and MW-27R.

30. McMillan did not dispute the accuracy of these sampling results.

31. Because McMillan had not achieved the cleanup objectives, it re-started ERH treatment in the vicinity of monitoring points P-1 and P-2.

32. On or about July 2, 2019, McMillan again advised the Trust that its internal operational sampling indicated compliance with cleanup objectives at all compliance monitoring points.

33. However, on July 16, 2019, McMillan admitted to the Trust that the analytical results for its latest groundwater screening samples confirmed that the cleanup objectives had not been achieved at monitoring point P-2.

34. On or about July 19, 2019, McMillan notified Ramboll that no further treatment in the vicinity of P-2 was required based on McMillan's new contention that the chemical 1,2-dichlorobenzene (1,2-DCB) was not a "volatile organic compound" and should not be counted in determining whether McMillan's cleanup objectives had been achieved.

35. On or about July 22, 2019, Ramboll responded to McMillan's newly asserted contention and informed McMillan that 1,2-DCB is a VOC and must be included in lab testing and counted in determining whether the cleanup objectives had been achieved.

36. On August 2, 2019, McMillan suspended ERH treatment based on its representation that its own internal operational sampling indicated that the cleanup objectives had been achieved, with 1,2-DCB included in the calculation.

37. On or about September 5, 2019, Ramboll conducted independent groundwater compliance sampling at monitoring points P-1 and P-2.

38. On or about September 20, 2019, Ramboll reported that its independent compliance sampling lab results showed that the cleanup objectives had not been met by McMillan at monitoring points P-1 and P-2. Specifically, the compliance testing showed 33,065 parts per billion (ppb) total VOCs in groundwater at monitoring point P-1 and 4,845 ppb total VOCs in groundwater at monitoring point P-2. To achieve the 90% reduction of total VOCs in groundwater under the ERH Contract, McMillan was required to reduce total VOCs in groundwater to 4,285 ppb or below.

39. Rather than seeking the Trust's permission to restart the ERH system, McMillan submitted on October 15, 2019 a "Data Summary" report in which it contended that the ERH system had succeeded and that the explanation for exceedances at monitoring points P-1 and P-2 was "ongoing source material" that is "external" to the ERH-treated area (top 40 feet of soil

within the DNAPL area), resulting in post-treatment “recontamination” at monitoring points P-1 and P-2.

40. On November 14, 2019, the Trust informed McMillan that it had breached the ERH Contract and that its design, installation, operation, and maintenance of the ERH system was “Defective” within the meaning of the ERH Contract.

41. Without providing notice to the Trust, and without authorization or approval from the Trust or from EPA, McMillan restarted the ERH system on or about November 27, 2019.

42. On December 2, 2019, the Trust asked the EPA to clarify whether 1,2-DCB should be considered one of the total VOCs whose cumulative value must not exceed 4,285 ug/L.

43. On December 11, 2019, the EPA responded by confirming that “1,2-dichlorobenzene is a volatile organic compound and requires treatment.”

**COUNT I:
FRAUD**

44. The Trust incorporates by reference the allegations contained in paragraph 1-43 of its Counterclaim as though fully stated herein.

45. To establish fraud, a plaintiff must show there is: (1) a material misrepresentation of past or existing fact (2) made with knowledge of or reckless disregard for the falsity of the statement, and (3) the misrepresentation is relied upon to the detriment of the relying party.

46. When McMillan entered into the ERH Contract with the Trust in October 2016 it represented that it was an expert in the design, installation and operation of ERH remediation systems.

47. When the Trust entered into the ERH Contract with McMillan it relied upon McMillan's representations that it was an expert in the design, installation and operation of ERH remediation systems.

48. When McMillan entered into the ERH Contract with the Trust it knew that the ERH system it was to design, install and operate would be required to reduce total VOCs, including 1,2-DCB, by 90% in groundwater.

49. When the Trust entered into the ERH Contract it relied upon McMillan's representations that it would design, install and operate an ERH system that would achieve a 90% reduction in total VOCs in groundwater that included 1,2-DCB.

50. When McMillan entered into the ERH Contract with the Trust it knew that the ERH system it would design, install and operate would not reliably remediate 1,2-DCB as part of the total VOCs that were to be remediated by the ERH system.

51. When McMillan entered into the ERH Contract with the Trust it knowingly or recklessly falsely represented to the Trust that its ERH system would reduce total VOCs by at least 90% even though McMillan knew that 1,2-DCB was part of the total VOCs that were to be remediated by 90% in groundwater.

52. When McMillan entered into the ERH Contract with the Trust it knew that its ERH system would not reliably achieve a 90% reduction in groundwater for total VOCs, that included 1,2-DCB.

53. McMillan's knowledge that the 90% reduction in total VOC concentrations in groundwater it was required to achieve is shown by its own Final Design Report. By way of example and not limitation, McMillan made these representations in its Final Design Report:

- a. In Section 1.5.1 of the Final Design Report, McMillan acknowledged that the VOC contamination in the DNAPL Area consisted of TCE, 1,1,1-TCA, and “8 other contaminants of concerns (COCs)” referenced in the 2014 Environ report (“Environ, 2014”). (Ex. 2, p. 9 (emphasis added).) However, Section 4.4 of Environ 2014 states that although two contaminants represented 58.5% and 16.3%, “[t]he remaining 25% is a combination of the 8 other compounds included in the analysis. The data output form [sic] the NAPLANAL analysis with estimated fractions of constituents is provided in Appendix H.” Appendix H, in turn, includes “o-dichlorobenzene” with CAS # of 95-50-1 which is another name for 1,2-DCB.
- b. In Section 1.5.2 of its Final Design Report, McMillan stated that “[t]he remedial goal for the ERH Remedial Action is to achieve a minimum 90% reduction in total VOC groundwater concentration within the DNAPL Area.” (Ex. 2, p. 11.) In footnote 1 immediately after that sentence, McMillan noted that the remedial objectives are identified in the May 11, 2001 Enforcement Action Memorandum. (*Id.*) However, McMillan acknowledged that “[t]hese objectives have been subsequently clarified in USEPA approved documents prepared by Environ....” It then goes on to list: the Environ the March 17, 2004 Environ Design Report (“Environ 2004”), the February 20, 2008 Environ Memorandum (“Environ 2008A), and the December 31, 2008 Environ Memorandum (“Environ 2008B”). The Environ 2004 only states that the remediation will be considered complete if the water from this area has achieved 90% reduction “based on concentration measured in water pumped

from the collection well/sump prior to pumping”. Those measurements in turn were taken in January 2005 and are discussed in Environ 2008A and set forth in Table 1 to Environ 2008A. That Table clearly specifies 1,2-DCB as one of the VOCs used to arrive at total VOCs that had to be reduced by 90%. (Because EPA subsequent to 2005 wanted sampling in three existing piezometers in the DNAPL area, those data are set forth in Table 2 to Environ 2008A and Table 2 include 1,2-DCB as one of the VOCs used to arrive at total VOCs.) Finally, Environ 2008B states in its concluding paragraph: “Treatment of the DNAPL Containment Area will be considered complete when the Total VOCs for the dissolved-phase concentrations in the DNAPL Containment Area is less than or equal to 4,285 ug/l. Total VOCs (the value that is equal to 10% of the baseline concentrations measured in January 2005).” Those are the same data reported in Table 1 to Environ 2008A.

- c. In Section 3.7 of the Final Design Report, McMillan stated that for the “sampling results that establish the remedial goals in the DNAPL Area, refer to Tables 1 and 2 of [Environ 2008A].” (Ex. 2, p. 32.) This once again showed that McMillan was aware that 1,2-DCB was in the groundwater that McMillan was to treat and that the remedial goal included the treating of the total VOCs including 1,2-DCB. McMillan also referred to sampling results in Table 4 of the June 2013 progress report (“Environ 2013B”). Environ 2013B also includes 1,2-DCB as one of the total VOCs to be reduced by 90%. (Environ 2013B Table 4.)

- d. Each of these reports cited by McMillan—Environ 2008A, Environ 2008B, Environ 2013B, and Environ 2014—includes 1,2-DCB as a detected VOC in the DNAPL Area to be included in measuring total VOCs. Indeed, in Environ 2008A Table 1, 1,2-DCB is the third highest VOC in total VOCs and in Table 2 (which reported the piezometer data), 1,2-DCB is the second highest VOC in P-2.

54. Through its Final Design Report and the reports cited therein, McMillan represented that its ERH system was designed to and would in fact treat and remove total VOCs including 1-2 DCB to a 90% reduction in concentrations.

55. McMillan knew that it was required to reduce 1,2-DCB during the operation of its ERH system as McMillan sent monthly progress reports to the Trust which included 1,2-DCB as a targeted VOC subject to the remediation goal. This included McMillan's monthly Progress Reports for April, May and June of 2019.

56. On July 19, 2019, McMillan claimed that it had satisfied its obligations under the ERH Contract even though there was not a 90% reduction in VOCs in the groundwater at the Site. McMillan claimed it had met the objectives because 1,2-DCB was no longer a "volatile organic compound" subject to the remediation objective in the ERH Contract. McMillan has repeated these claims since then:

- a. In its July 2019 progress report, for the first time in its monthly Progress Reports, McMillan deleted 1,2-DCB from the total VOCs measurements in hopes of satisfying its cleanup goals.
- b. In its October 15, 2019 "Data Summary," McMillan treated 1,2-DCB as being outside of its contractual obligations by repeatedly asserting that 1,2-DCB was

not within the original list of contaminants of concern that were subject to treatment.

- c. In its October 10, 2020 letter to the EPA, McMillan asserted that “1,2-DCB is a semi-volatile organic compound (SVOC) that may not be successfully remediated by ERH due to its high boiling point, high water co-boiling temperature (97.8 C), and low corresponding vapor pressure at this temperature.”

57. In its Complaint McMillan also asks the Court to confirm McMillan’s view that it has met all of its contractual obligations because it asserts 1,2-DCB is not a VOC but only a “semi volatile” (a SVOC) and that VOCs must be calculated with 1,2-DCB omitted. (Complaint, Count VII and Para. 90.)

58. What McMillan knew in 2020 and 2021 about the limits of the ability of ERH systems to treat 1,2-DCB it knew in 2016 when it entered into the Contract with the Trust.

59. McMillan repeatedly represented to the Trust its ERH expertise, that it had reviewed all the data, accepted the site “as is” and would reduce total VOC concentrations in groundwater by at least 90%.

60. But from its recent filings, in McMillan’s view 1,2-DCB is a SVOC, not a VOC, and cannot be treated by its ERH system. Even though McMillan knew from its own Final Design Report (as confirmed in its later operating reports) that the DNAPL Area groundwater it was to remediate included 1,2-DCB as part of the total VOCs it was to reduce by 90%, McMillan concealed from the Trust McMillan’s knowledge about ERH systems and their ability (or inability) to successfully treat 1,2-DCB and misrepresented what it and the ERH system it designed, built and operated, would do.

61. In short, McMillan's representation and inducement to the Trust to enter into the Contract with it (and to pay it more than \$2.1 million as noted below) that it would reduce total VOCs (which McMillan knew included 1,2-DCB) were false and were either known to have been false at the time they were made by McMillan or knowingly made by McMillan with reckless disregard as to whether they were true or false.

62. When the Trust entered into the ERH Contract it relied on the representations from McMillan that the ERH system it would design, install and operate would treat and remove total VOCs in the DNAPL Area which McMillan knew included 1,2-DCB to achieve at least a 90% reduction. The Trust would not have entered into the ERH Contract with McMillan and paid McMillan more than \$2.1 million had it known that McMillan's ERH system was not intended to, or not capable of, treating and removing 1,2-DCB from the soil and groundwater.

63. Nor would the Trust have waited years for the ERH system to be designed, operated, started and re-started, had it known that McMillan's representations that it was capable of and intending to treat and remove total VOCs including 1,2-DCB and other VOCs by at least 90% in groundwater were false.

64. The Trust has been harmed by these misrepresentations. The Trust has already paid \$2,178,154.92 to McMillan with the understanding and belief that McMillan's ERH system would reduce total VOCs, including 1,2-DCB, in groundwater by more than 90%. Five years after McMillan made these misrepresentations in entering into the Contract with the Trust in 2016, the EPA-required cleanup objectives still have not been met, because McMillan's ERH system failed to reduce 1,2-DCB and other VOCs in groundwater by 90% or more and McMillan spread the contamination. The Trust paid McMillan \$2,178,154.92 for a failed ERH treatment, subsequently spent more than \$300,000 to address the continued presence of VOCs (including

1,2-DCB) in groundwater in the DNAPL Area, and will incur significant additional costs in the future to address the contamination in that area that McMillan left behind.

**COUNT II
BREACH OF CONTRACT**

65. The Trust incorporates by reference the allegations contained in paragraph 1-64 of its Counterclaim as though fully stated herein.

66. The Trust and McMillan entered into the ERH Contract, effective October 4, 2016.

67. The ERH Contract required McMillan to design, install, operate, and maintain an ERH system “to achieve a reduction in the concentration of total volatile organic compounds (VOCs) in groundwater in the Third Site DNAPL Area to a depth of forty (40) feet and in the small ATT zone outside the sheet pile wall, by greater than 90% at both locations.” [Ex. 1, § 1.1.1.]

68. McMillan did not achieve the ERH Contract’s cleanup objective of reducing total VOCs in groundwater in the DNAPL Area to a depth of forty feet by greater than 90%.

69. The EPA has not given its approval of the performance of all of the work required under the ERH Contract.

70. The independent compliance sampling by Ramboll has repeatedly showed that McMillan failed to achieve the cleanup objectives required by the ERH Contract in the DNAPL Area.

71. The failure to achieve the cleanup objectives required by the ERH Contract resulted from McMillan’s flawed and inadequate design, installation, and operation of the ERH system.

72. McMillan has breached the ERH Contract by, among other failures, failing to achieve the cleanup objectives of 90% reduction of total VOCs as required by the ERH Contract.

73. The Trust performed all of its obligations under the ERH Contract.

74. The Trust has suffered damages as a result of McMillan's breaches of the ERH Contract, which damages include the Trust's payment of more than \$2,100,000 to McMillan for its ERH system, the costs of investigating and correcting the contamination that McMillan failed to clean up as required by its ERH Contract and the Trust's attorneys fees in enforcing the term of the ERH Contract.

**COUNT III:
BREACH OF CONTRACT**

75. The Trust incorporates by reference the allegations contained in paragraphs 1-74 of its Counterclaim as though fully stated herein.

76. The ERH Contract includes a definition of the word "Defective." Exhibit 1, at Section 18.1.10.

77. McMillan's design, installation and operation of its ERH system was Defective within the meaning of the ERH Contract.

78. McMillan's Defective design, installation and operation of electrodes and vapor extraction wells that spread contamination at the Site and caused damage to the Trust.

79. The Trust has suffered damages as a result of McMillan's Defective work, which damages include the Trust's payment of more than \$2,100,000 to McMillan for its Defective ERH system, the costs of investigating and correcting the Defective Work of McMillan and the Trust's attorneys fees in enforcing the terms of the ERH Contract.

**COUNT IV
NEGLIGENCE**

80. The Trust incorporates by reference the allegations contained in paragraphs 1-79 of its Counterclaim as though fully stated herein.

81. McMillan is an engineering firm that presented itself as an expert in the design, installation, and operation of in-situ thermal remediation technology.

82. The Trust hired McMillan to design, install, and operate an ERH System at the Site.

83. McMillan owed a duty to the Trust to exercise the expert skill and knowledge of a qualified environmental consultant in the design, installation, and operation of its ERH system.

84. McMillan breached this duty by failing to exercise such expert skill and knowledge.

85. McMillan's Defective work has caused the contamination at the Site to spread, causing additional property damage to the Site.

86. The Trust has suffered damages as a result of McMillan's breach of its duties to the Trust.

87. These damages include the amounts in excess of \$2.1 million paid to McMillan and the cost to investigate and remediate this additional property damage. As of June 1, 2021, the Trust had already incurred more than \$300,000 to remedy the damage caused by McMillan's negligence. The Trust anticipates that it will incur future damages in excess of \$500,000 to remedy the residual contamination that McMillan's negligence spread.

**COUNT V:
ENVIRONMENTAL LEGAL ACTION**

88. The Trust incorporates by reference the allegations contained in paragraphs 1-87 of its Counterclaim as though fully stated herein.

89. Pursuant to Section 2 of Indiana's Environmental Legal Action Statute, Ind. Code § 13-30-9-2, the Trust may bring an environmental legal action against any person who caused or contributed to the release of a hazardous substance into the surface or subsurface soil or groundwater that poses a risk to human health and the environment to recover reasonable costs of a removal or remedial action involving the hazardous substances.

90. During McMillan's installation and operation of the ERH System at the Site, McMillan caused and/or contributed to the release of hazardous VOCs, deeper into the surface and subsurface soil and groundwater beyond the 40-foot depth treatment area.

91. The Trust has already incurred costs for the investigation of this release of hazardous substances.

92. The Trust will incur costs for the future investigation of this release, and for subsequent removal and/or remedial activities required at the Site due to the spread of hazardous VOCs.

93. The Site is subject to the Environmental Legal Action statute because it is not listed on the EPA's national Priorities List for hazardous substance response sites (40 CFR 300 *et seq.*), has not scored twenty-five or greater under the Indiana scoring model at 329 IAC 7, and has not been deemed by the Commissioner of the Indiana Department of Environmental Management to currently pose an imminent threat to human health or environment pursuant to Section 1 of Indiana's Environmental Legal Action Statute, Ind. Code § 13-30-9-1.

94. McMillan is liable to the Trust under Indiana Code § 13-30-9-2 and § 13-30-9-3 for all reasonable costs of a removal or remedial action involving the release of hazardous substances by McMillan at and from the Site, and an award of all reasonable attorneys' fees and costs.

**COUNT VI:
COST RECOVERY UNDER CERCLA SECTION 107**

95. The Trust incorporates by reference the allegations contained in paragraph 1-94 of its Counterclaim as though fully stated herein.

96. The Site is a "facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

97. McMillan is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

98. McMillan's actions have resulted in the release of hazardous substances at the Site into the environment beyond the 40-foot treatment area.

99. The Trust has incurred necessary response costs that are consistent with the U.S. EPA's National Contingency Plan as a result of the release of hazardous substances at the Site.

100. The Trust will continue to incur necessary response costs as a result of the release of hazardous substances at the Site.

101. McMillan is liable to the Trust under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), for any and all response costs incurred or to be incurred by the Trust as a result of the release of hazardous substances at the Site.

TRUST'S JURY DEMAND

Pursuant to Fed. R. Civ. P. 38(b), the Trust demands this matter be tried to a jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Counterclaim Plaintiff Third Site Trust Fund seeks a judgment in its favor and against Counterclaim Defendant McMillan-McGee Corporation:

- A. Finding McMillan liable for fraud and awarding the Trust all compensatory, consequential, and other damages to which it is entitled, including an award of punitive damages.
- B. Finding that McMillan negligently breached the ERH Contract and awarding the Trust compensatory and consequential damages;
- C. Finding that McMillan's negligence caused additional property to the Site for which McMillan is liable and awarding the Trust compensatory and consequential damages;
- D. Finding McMillan liable under Indiana's ELA statute and under CERCLA and awarding the Trust all costs for the investigation, response, removal, and remedial actions incurred and to be incurred by the Trust related to the release of hazardous substances at the Site, including the Trust's reasonable attorneys' fees and costs; and
- E. Awarding the Trust all other compensatory, consequential, punitive and other damages to which it may be entitled, including, but not limited to, attorneys' fees and expenses incurred in responding to McMillan's Complaint and in bringing this Counterclaim, and all other relief deemed just and proper by this Court.

Respectfully submitted,

/s/ Christopher J. Braun
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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following counsel of record:

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